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May 3, 1993

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VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

RE: MM Docket No. 93-93
BPET-900904KE
Bakersfield, California

Dear Ms. Searcy:

Transmitted herewith on behalf of Valley Public Television, Inc., are an original and six (6) copies of its Motion to Enlarge Issues in connection with its above-referenced application.

Should any question arise concerning this matter, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

Patricia A. Mahoney
Patricia A. Mahoney
Counsel for
Valley Public Television, Inc.

PAM/dlr

Enclosure

cc: The Honorable Arthur I. Steinberg (w/enc.)*
Norman Goldstein, Esquire (w/enc.)*
Thomas Schattenfield, Esquire (w/enc.)

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BEFORE THE

Federal Communications Commission

MAY - 3 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In re Applications of)	MM Docket No. <u>93-93</u>
)	
COMMUNITY TV OF)	BPET-881012KE
SOUTHERN CALIFORNIA)	
)	
VALLEY PUBLIC TELEVISION, INC.)	BPET-900904KE
)	
For Construction Permit)	
For a New TV Station on)	
Channel *39)	
Bakersfield, CA)	

Directed to: The Honorable Arthur I. Steinberg
Administrative Law Judge

MOTION TO ENLARGE ISSUES
SUMMARY

Herein Valley Public Television (Valley) moves, pursuant to Section 1.229 of the Commission's Rules, that the issues in this proceeding be enlarged to include issues concerning the basic qualifications of Community TV of Southern California (CTSC) and a share-time issue. As demonstrated herein, serious questions exist as to whether CTSC possesses the requisite legal and character qualifications to be a Commission licensee. CTSC has failed to demonstrate that it is eligible to be the licensee of a noncommercial television station in Bakersfield. Its application does not establish that its officers, directors, and members of its governing Board are broadly representative of the educational, cultural, and civic groups in Bakersfield.

area, and Bakersfield is not in Southern California or the

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In re Applications of)	MM Docket No. 93-93
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SOUTHERN CALIFORNIA)	
)	
VALLEY PUBLIC TELEVISION, INC.)	BPET-900904KE
)	
For Construction Permit)	
For a New TV Station on)	
Channel *39)	
Bakersfield, CA)	

Directed to: The Honorable Arthur I. Steinberg
 Administrative Law Judge

MOTION TO ENLARGE ISSUES

Valley Public Television (Valley), by its attorneys, hereby respectfully moves, pursuant to Section 1.229 of the Commission's Rules,¹ that the issues in this proceeding be enlarged to include the issues set forth below, including issues concerning the basic qualifications of Community TV of Southern California (CTSC). In support whereof, the following is submitted:

I. INTRODUCTION

As demonstrated herein, serious questions exist as to whether CTSC possesses the requisite legal and character qualifications to be a Commission licensee. CTSC has failed to demonstrate that it is eligible to be the licensee of a

¹The facts alleged herein are supported by the attachments hereto and by documents in the Commission's records, for which official notice is requested. Attachment 1 hereto contains Valley's proposed discovery, pursuant to Section 1.229(e) of the Rules.

noncommercial television station in Bakersfield. Moreover, CTSC's Articles of Incorporation restrict its activities to Southern California and the Greater Los Angeles area, and Bakersfield is not in Southern California or the Greater Los Angeles area. Finally, CTSC has over the last five years abused the Commission's processes by filing strike applications and pleadings designed to delay and impede Valley's applications. These matters should be explored through issues specified against CTSC in this proceeding.

A share-time issue should also be specified, in the event that the Commission finds both applicants to be fully qualified but cannot make a significant distinction between the applicants on comparative grounds.

**II. CTSC IS NOT ELIGIBLE TO HOLD A NONCOMMERCIAL
EDUCATIONAL TELEVISION STATION LICENSE IN BAKERSFIELD**

In Way of the Cross of Utah, Inc., 101 F.C.C. 2d 1368 (1985), the Commission considered at length the basic eligibility requirements for applicants for noncommercial educational television stations. As the Commission explained, FCC Form 340 elicits information relevant to a determination of an applicant's eligibility to operate on a reserved channel. The form requires educational organizations (not educational institutions) that are applying to operate on reserved television channels (not FM channels) to submit "evidence that officers, directors, and members of the governing board are broadly representative of the educational, cultural and civic groups in the community." 101

F.C.C. 2d at 1370-71. An organizational (not institutional) applicant for a new noncommercial educational television station that cannot demonstrate that its officers, directors, and governing board members are "broadly representative" of the community for which it is applying is ineligible to hold a noncommercial television station license in that community. See Id. at 1375, 1376-77.

At the time Way of the Cross was decided, the Commission had recently revised FCC Form 340; and the revised version of the form did not include the requirement that the applicant demonstrate that its Board was "broadly representative." However, the Commission specifically discussed the omission of the requirement from the revised form in Way of the Cross and held that, despite the omission of the question on the revised form, applicants using the revised form were still required to submit the information requested in the question that was deleted from the revised form:

We also note that we recently revised Form 340, Revision of Application for Construction Permit (FCC Form 340, FCC 84-327, released July 20, 1984. In paragraph one of that decision, we stated that "we are changing neither substantive law, policy nor any underlying Commission requirement pertaining to the ultimate public interest finding." Although approved, the form is still awaiting printing and distribution, so that the version of the form used by the applicants here is still being used. Question 10 was inadvertently omitted from the revised form. The omission was inconsistent with our



applicant's officers, directors and members of its governing board are broadly representative of the educational, cultural and civic segments of the principal community to be served."

In Way of the Cross, the Commission concluded that the applicants had failed to demonstrate that their governing trustees were "broadly representative of the educational, cultural and civic groups in the community" and that the

officers includes 59 individuals, only one of whom (1.7% of the total) has a Bakersfield address. Since no other information was provided, it must be presumed that that individual, Jerry K. Stanners, who is listed only as the President and Chief Executive Officer of Freymiller Trucking, Inc., is the only director or officer of CTSC with any connection to Bakersfield.

The chart below vividly illustrates that CTSC's Board is broadly representative only of Los Angeles. The members of the Board of CTSC who were included in CTSC's January 1993 amendment are grouped by community and county of residence (or whatever address was included in the amendment) here:

<u>City/Community</u>	<u>County, State</u>	<u>Number of Members</u>
Los Angeles	Los Angeles, CA	15
Beverly Hills	Los Angeles, CA	7
Pacific Palisades	Los Angeles, CA	6
Pasadena	Los Angeles, CA	5
South Pasadena	Los Angeles, CA	4
San Marino	Los Angeles, CA	3
Glendale	Los Angeles, CA	2
Marina del Ray	Los Angeles, CA	1
El Segundo	Los Angeles, CA	1
Rancho Palos Verdes	Los Angeles, CA	1
Manhattan Beach	Los Angeles, CA	1
Inglewood	Los Angeles, CA	1
Studio City	Los Angeles, CA	1
North Hollywood	Los Angeles, CA	1
Playa del Ray	Los Angeles, CA	1
Whittier	Los Angeles, CA	1
Ladera Heights	Los Angeles, CA	1
Santa Monica	Los Angeles, CA	1
La Canada, Flintridge	Los Angeles, CA	1
Irvine	Orange, CA	1
Corona del Mar	Orange, CA	1
Santa Ana Heights	Orange, CA	1
Bakersfield	Kern, CA	1
Seattle	King, WA	1

As is evident from the chart above, the only individual on the CTSC Board who resides in the county in which Bakersfield is located (Kern) is the sole individual from Bakersfield. Thus, CTSC is as "broadly representative" of Bakersfield as it is of Seattle, Washington. Los Angeles County residents overwhelmingly dominate the Board.

As Attachments 5-12 hereto demonstrate, Los Angeles and the Greater Los Angeles area have very little in common with Bakersfield and the Central or San Joaquin Valley of California. CTSC has submitted nothing to show that its officers, directors, and governing board members (with one lone exception) have any connection to Bakersfield whatsoever.

Moreover, as is evident from the discussion at pages 9-16 infra, CTSC's articles of incorporation geographically confine CTSC's activities to Southern California/"the greater Los Angeles area." Thus, it is clear from CTSC's own charter that its interests and activities were not intended to be directed to Bakersfield and the San Joaquin Valley in which Bakersfield is located. It is not surprising then that CTSC's officers and directors are not broadly representative of Bakersfield.

It is apparent that CTSC has failed to demonstrate that its officers, directors, and members of its governing board are "broadly representative of the educational, cultural and civic groups" in Bakersfield. Accordingly, the following issue is requested and should be specified against CTSC:

To determine whether the officers, directors, and members of CTSC's governing board are broadly representative of the educational, cultural, and civic groups in Bakersfield, and, if not, the effect thereof on CTSC's basic qualifications to be a Commission licensee.

**III. CTSC's CORPORATE CHARTER RESTRICTS IT
FROM OPERATING ITS PROPOSED TELEVISION
STATION IN BAKERSFIELD**

In addition to having officers and a Board that is almost totally composed of residents of Los Angeles County, CTSC is also limited by its corporate charter to holding broadcast licenses in Southern California and confined to the Greater Los Angeles Area in conducting its activities to serve such stations. Attached hereto as Attachment 13, is a copy of the Articles of Incorporation of CTSC, official notice requested. Article Fourth of CTSC's Articles of Incorporation, last amended in 1970,² states as follows:

"The specific and primary purposes for which this corporation is formed are the development, financing and operation of one or more noncommercial educational broadcast facilities in Southern California; the coordination of educational, cultural, governmental and other interests in the greater Los Angeles area to service such facilities; and to do all things reasonable, necessary, suitable, proper, convenient or incidental to the aforesaid purposes."

Bakersfield, California, is not in Southern California, and it is not by any stretch of the imagination in the Greater Los Angeles area. Bakersfield is located in Central California, in the San

²Valley has not found any more recent amendment to this Article in the Commission's files.

Joaquin Valley, part of the Great Central Valley. CTSC is therefore not authorized to hold a television station license in Bakersfield. CTSC has no authority to extend its operations outside of the area specified in its corporate charter; thus, it lacks basic legal qualifications to be a broadcast licensee in Bakersfield, and its action in filing its application for Bakersfield is ultra vires.

Initially it should be noted that it is CTSC - not Valley or

it is not final. Valley has sought reconsideration of that decision.

Second, this is a comparative proceeding; the Channel 67 application was not mutually exclusive with any other application. Here there is a fully qualified applicant whose charter does not restrict it in any way with respect to Bakersfield.³ Moreover, if the issue is not addressed and resolved at this time and in the unlikely event that CTSC prevails in this proceeding, and if CTSC's ultra vires acts are in the future challenged at the state level (a likely possibility, since CTSC is dependent upon contributions and sponsorships of local, Los Angeles based individuals and companies that might be concerned about such ultra vires acts), it will be too late for Valley. Valley will not receive a grant by default if CTSC is later found by a California court not to be able to operate in Bakersfield.

Third, this is a television proceeding - not a translator proceeding. The television station will have a far greater coverage area, and a far larger number of persons will be serviced by it. Local television stations are generally active in their communities and engage in nonbroadcast activities to enhance their programming. See, e.g., Section 73.520(b) of the Rules. However, CTSC's charter limits its nonbroadcast activities in support of the television station to the Greater

³Thus, the issue should also be added on a comparative basis.

Los Angeles area. The restriction in CTSC's Articles confining such activities to the Greater Los Angeles area would appear to preclude such activities in Bakersfield.

Fourth, the LPTV Branch did not really squarely address the issue because Valley "cited no source that defines the geographic boundaries of Southern California or that establishes that Bakersfield is outside that area" and because CTSC submitted a legal opinion from its counsel. A copy of CTSC's legal opinion is Attachment 14 hereto. Valley has obtained a legal opinion from counsel as well, and Valley's legal opinion, the statement of Joanne Sanoian, Esquire, Attachment 5 hereto, directly refutes CTSC's. Moreover, the LPTV Branch made no mention of the

278, the page at which "Southern California" appears, is the sentence:

"Santa Barbara marks the arbitrary border of Southern California, beyond which the influence of Los Angeles wanes."

As the attachments hereto demonstrate, due north of Los Angeles there is a very natural boundary to Southern California - the Tehachapi mountains:

"More than 60 percent of Californians live in the third of the state that lies south of the Tehachapi Mountains. In the south, people are concentrated in a narrow strip of land that runs between the Coast ranges and the Pacific Ocean. Los Angeles, San Diego, and an endless sea of suburbs are packed into this long belt."

Stein, America the Beautiful, California 26 (1988). See Attachment 9. California "has two mountain 'spines' that run north and south throughout the state." Id at 10. The Sierra Nevadas stand along the state's eastern border, and the Coast ranges along the Pacific shore. The Tehachapi Mountains tie the Sierra Nevadas and the Coast ranges together; many Californians consider the Tehachapis to be the dividing line between northern and southern California." Id. Indeed, attached hereto as Attachments 5-7 are declarations from three California residents who all describe the Tehachapi Mountains (south of Bakersfield and north of Los Angeles as marking the northern boundary of Southern California.

There exist various different descriptions of the regions of

California or the Greater Los Angeles area. For example, America the Beautiful, California, at 92-107, describes the following regions of California: the North Coast; the Northeast; the Sierras; Sacramento and the Wine Country; the Bay Area; Central California (including the City of Santa Barbara and the San Joaquin Valley cities of Fresno and Bakersfield); the Deserts; and Los Angeles and San Diego. See Attachment 9. Let's Go: The Budget Guide to California and Hawaii (1991), attachment 10 hereto, divides the state into the following regions/destinations: San Diego; Los Angeles; Near Los Angeles; The Desert; Central Coast; San Joaquin Valley (including the cities of Bakersfield, Visalia, and Fresno); Sierra Nevada; the Mother Lode; San Francisco; the San Francisco Bay Area; Napa and Sonoma; Northern Coast; and Sacramento Valley and the Cascades. The map of the "Los Angeles Area" contained in that book clearly does not include Bakersfield. Id. at 100.

Let's Go's chapter on the San Joaquin Valley offers insight on Bakersfield and the area in which it is located:

"while the rest of California speeds recklessly toward the millennium, the San Joaquin Valley quietly minds its own agribusiness. Known to most travelers as the 'middle-of-nowhere' that separates Los Angeles and San Francisco, the area is nevertheless one of the most vital agricultural regions in the country....Although the Valley's livelihood is the bread and butter of California's economy, nowhere else in the state does one feel quite so removed from things typically Californian."

Id. at 225-226. In describing where Bakersfield is located, Let's Go states:

"Bakersfield lies 110 mi. north of Los Angeles and 104 mi. south of Fresno (the major city of the Central Valley), at the southern end of California's major agricultural area, the San Joaquin Valley."

Id. at 227.

Also attached hereto as Attachments 11-12, are copies of maps from well known atlases. The maps are the insert maps for Los Angeles and vicinity. None of the maps includes Bakersfield in the Greater Los Angeles area. The 1993 Rand McNally Commercial Atlas & Marketing Guide 148 (124th edition), which identifies "Rand McNally Metro Areas," does not include Bakersfield in its Los Angeles Metro Area. Its map of "Los Angeles and Vicinity" includes all or part of the following counties: Los Angeles, Ventura, San Bernardino, Riverside, Orange, and San Diego. No part of Kern County, in which Bakersfield is located, is included on the map. See Attachment 11, official notice requested.

The U.S. Bureau of the Census does not include Bakersfield in the Los Angeles area. Bakersfield is its own metropolitan statistical area (MSA). Los Angeles is in the Los Angeles - Anaheim - Riverside Consolidated Metropolitan Statistical Area (CMSA) and the Los Angeles - Long Beach Primary Metropolitan Statistical Area (PMSA). See U.S. Bureau of the Census, State and Metropolitan Area Data Book 1991 (4th ed.) Table 2, XXIV, XXVI, 353-359, official notice requested.

Finally, Medical Society Services, Inc., 26 F.C.C. 2d 617 (1970), upon which the LPTV branch relied in rejecting Valley's objection to STSC's Channel 67 application, is easily distinguishable. In Medical Society, a challenge was raised as to whether a county medical society that had applied for authorizations in the special emergency radio services was authorized under Georgia law to provide communications services for its members. The Commission concluded that there was nothing proposed that seemed inconsistent with the statutory provision at issue. See 26 FCC 2d at 620. Here there is no question of whether a corporation is authorized to engage in a business that is not specifically enumerated in its charter. CTSC's charter specifically imposes a geographic limitation on its operations. That limitation cannot and should not be ignored. Thus, the issue set forth below should be added both as a basic, qualifying issue and as a comparative issue:

To determine what restrictions and/or limitations CTSC's Articles of Incorporation place on its ability to hold and operate a television station in Bakersfield, California; and the effect thereof on its basic and comparative qualifications to be a licensee in Bakersfield.

IV. CTSC HAS ABUSED THE COMMISSION'S PROCESSES

The Commission has held that abuse of process is a "very broad concept" that:

"generally can be defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure or rule was not designed or

intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule."

Policies and Rules Relating to Broadcast Renewal Applicants, 3

FCC Rcd 5179, 5199 n. 2 (1988). As is demonstrated herein, CTSC has abused the Commission's processes by filing applications and pleadings designed and intended for the purpose of hindering and/or delaying Commission action on applications Valley has had pending at the Commission.

The most obvious of the abuses is CTSC's application for a television translator station in Channel 36 in Bakersfield. CTSC, an experienced broadcast licensee, filed an application that could not be filed in order to obstruct and impede Valley's timely filed application for Channel 36, to which CTSC had already objected contending, inter alia, that no application for Channel 36 could be granted in the area.

On July 1, 1987, Valley filed for authority to operate a television translator station to provide service to the Bakersfield area on Channel 36 (BPTT-JA0702MT). That application was considered mutually exclusive with a Channel 36 application at Santa Barbara, California, filed by Response Broadcasting Corporation ("Response") (BPTTL-810706IT). As a result, both applications were placed in a Commission lottery, which Response won. Valley was advised by the Commission to file a new application for Channel 36 in the June 14-24, 1989, window and to

include a showing of terrain shielding to the proposed Response station.

Valley's new application was accepted for filing on August 1, 1989 (BPTT-JC0624QF). On August 31, 1989, CTSC filed its "Petition to Deny" against Valley, alleging: (1) that Valley's application did not meet the Commission's "letter perfect" standard for acceptance; (2) that Valley's application was inconsistent with Valley's own application for Channel *39 in Bakersfield; and (3) that Valley's application, or for that matter, any application for Channel 36 in the area, could not be granted pending the outcome of the Land Mobile Sharing Inquiry in General Docket 85-172.⁴

Valley rebutted these allegations in its opposition filed on September 25, 1989, responding to each and every allegation put forth in CTSC's Petition to Deny. Without regard for the low power television processing rules, which do not permit reply pleadings by a petitioner to deny, see 47 C.F.R. §73.3584(c), CTSC filed a reply to Valley's opposition. Valley's motion to strike CTSC's reply as an unauthorized pleading under the Commission's rules led to CTSC's filing a response to that motion, in which it essentially repeated arguments from the Petition to Deny.

⁴It is significant that CTSC filed no objection to the Response application for Santa Barbara, even though the same arguments made against Valley applied with equal force to that application.

While these pleadings were pending, during the December, 1989, low power filing window period, in clear violation of the Commission's processing rules, CTSC filed its own application for a television translator station on Channel 36 in Bakersfield. Not only was this a blatant disregard for and violation of the Commission's rules, it contradicted all of the arguments CTSC had advanced as the basis for its own earlier-filed petition to deny Valley's Channel 36 application! The "letter perfect" standard for compliance with the Commission's rules in translator applications was conveniently ignored by CTSC with respect to its own application, since adherence to the Commission's rules clearly precluded its own filing. Furthermore, by filing for Channel 36 in the Bakersfield area, CTSC's argument that Valley's filing was inconsistent with its Channel *39 application applied with equal force to CTSC's application, since CTSC also had an application for Channel *39 on file with the Commission.

Finally, by filing for Channel 36, CTSC ignored its own argument that the land mobile sharing inquiry prohibited consideration of an assignment to Valley on Channel 36 in the Bakersfield area. In short, by filing its own application for Channel 36, CTSC refuted all of its own arguments against Valley's Channel 36 application, evidencing the groundless nature of its Petition to Deny and demonstrating CTSC's bad faith in filing it. Moreover, it was evident that the application did not lie and could not be accepted for filing in light of the pending Valley application. The only possible explanation for the blatant inconsistencies

presented by CTSC's Petition to Deny and its own application for Channel 36 (as well as its totally unauthorized filing) is that CTSC did not file its application in an attempt to get a station on Channel 36 in Bakersfield. Rather, it filed to block and delay Valley's application.

On April 6, 1992, the Commission returned CTSC's Channel 36 application as unacceptable. While its application was returned, as CTSC always knew it would be, CTSC had achieved its goal: it had created a delay for Valley's application of over two years.

CTSC's conduct with respect to Channel 36 in Bakersfield is a striking example of an applicant using a Commission process or procedure to achieve a result which that process or procedure was not intended to achieve. It was not, however, the only example. Indeed, it is but one instance in a pattern of conduct that reflects CTSC's unfitness to be a licensee.

Over the last five years CTSC has, by filing applications and petitions to deny designed and intended for the sole purpose of hindering and delaying Commission action on Valley's application, fought every single effort of Valley to bring free, public educational television to the Bakersfield area. CTSC's actions constitute a clear abuse of the Commission's processes which should be examined in an issue to determine the effects thereof upon CTSC's character and ability to operate in the public interest.

During this period of time, in an effort to improve reception in the Kern County area, and particularly to bring the

first over-the-air noncommercial educational television service to the residents of Bakersfield, Valley has made several efforts at securing Commission authority to operate stations in the Bakersfield area. However, each and every time Valley has made such an effort, CTSC has used its considerable financial and legal resources to launch attacks on Valley's application. Since 1987, when Valley first applied for authority to operate a TV translator on Channel 36,⁵ CTSC has fought Valley over each of its efforts to serve the Bakersfield area, relying on an avalanche of paper and the limited resources of the Commission to block the provision of free noncommercial television to the people of Bakersfield. Viewed individually, and as reinforced in their entirety, these tactics clearly constitute an arrogant and outrageous abuse of Commission process that only demonstrates that CTSC is unfit to be the licensee of any station.

Over this period of five years, CTSC has fought Valley with three strike petitions to deny as well as a cross-filed, wholly improper application for the sole purpose of preventing Valley from providing an educational, over-the-air television service to the Bakersfield area. CTSC's motivation is clearly economic as well as anti-competitive. Even though CTSC's station KCET in Los

⁵Valley's attempt to serve Bakersfield through a television translator station was motivated, in part, by the fact that the translator service provided an inexpensive yet effective method of bringing free noncommercial educational television to the Bakersfield area. CTSC's actions have only resulted in making this relatively inexpensive effort a costly and difficult endeavor.